STATE OF MICHIGAN

COURT OF APPEALS

MAYNARD WIERTALLA,

Petitioner-Appellee,

v

CIVIL SERVICE COMMISSION and DEPARTMENT OF CORRECTIONS,

Respondents-Appellants.

UNPUBLISHED
December 22, 2005

No. 254646
Ingham Circuit Court
LC No. 02-000944-AA

Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Respondents, the Civil Service Commission (CSC) and the Department of Corrections (DOC), appeal by leave granted from a circuit court order reversing the CSC's decision affirming the DOC's disciplinary suspension and transfer of petitioner for violating a work rule. The circuit court reinstated a hearing officer's decision to impose discipline in the form of a reprimand and supervisory training. We reverse.

A prison employee of the DOC filed a sexual harassment complaint against petitioner. Following an investigation and determination by the DOC that petitioner violated a work rule prohibiting physical contact, a discipline coordinator in the DOC's central office decided that petitioner should be suspended for 15 days and reassigned to a different prison facility. A civil service hearing officer subsequently reduced the discipline to a written reprimand and supervisory training, as recommended by the warden of the prison facility where petitioner worked. The DOC appealed the hearing officer's decision to the Employment Relations Board (ERB), which recommended that the Civil Service Commission (CSC) reinstate the discipline coordinator's disciplinary choice. Following the CSC's approval and adoption of the ERB's recommendation, petitioner filed an appeal to the circuit court, which reversed the CSC's decision and reinstated the hearing officer's decision that petitioner be reprimanded and undergo supervisory training.

An aggrieved party may challenge a CSC decision by filing a direct appeal to the circuit court pursuant to the provisions governing appeals from an administrative agency under the Administrative Procedures Act (APA), MCL 24.201 *et seq.* See MCR 7.104(C), and *Womack-Scott v Dep't of Corrections,* 246 Mich App 70, 79; 630 NW2d 650 (2001). Const 1963, art 6, § 28, establishes the standard of review for a circuit court reviewing a CSC decision. *Hanlon v Civil Service Comm,* 253 Mich App 710, 716; 660 NW2d 74 (2002). At a minimum, the circuit

court must determine whether the CSC's decision was authorized by law and, "in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." Const 1963, art 6, § 28. We review the circuit court's decision to determine whether the circuit court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Service Comm,* 220 Mich App 226, 234; 559 NW2d 342 (1996). The latter standard is indistinguishable from the clearly erroneous standard of review. *Id.* at 234-235. But we review constitutional questions de novo. *Hanlon, supra* at 717.

We conclude that the circuit court misapprehended or grossly misapplied the substantial evidence test by rendering its own finding that the DOC disciplined petitioner, in part, on the basis of an unsubstantiated violation of a work rule prohibiting harassment, and then using that finding to hold that the CSC's decision was not supported by competent, material, and substantial evidence. The CSC is a constitutional body, with power to determine the procedures by which a state civil service employee may review a grievance. *Viculin v Dep't of Civil Service,* 386 Mich 375, 393; 192 NW2d 449 (1971). It has authority to make rules and regulations within its constitutional limits. *Hanlon, supra* at 718. Consistent therewith, the CSC was permitted to adopt findings made at the lower levels of the review provided by its rules and regulations. *Id.* at 726.

The CSC in this case adopted the ERB's recommendation pursuant to Civil Service Rule 1-15.5. The ERB, as the CSC's appellate body, was subject to the standards imposed on it by the CSC when issuing its March 27, 2002, recommendation that the CSC reverse the hearing officer's decision. See *Doster v Dep't of Mental Health,* 161 Mich App 436, 441; 411 NW2d 725 (1987), CSC Regulation 8.05(4)(P)(1) (effective March 18, 2001), and the CSC's decision in *Womack v Dep't of Corrections*, CSC 96-06. Among the appellate standards applicable to the ERB, as set forth in Civil Service Regulation 8.05(4)(P)(1)(g), effective March 18, 2001, was that the ERB determine if the portion of the hearing officer's decision based on a contested hearing was supported by a preponderance of competent, material, and substantial evidence on the whole record. Pursuant to Civil Service Rule 1-15-5, the CSC was permitted to "approve, reject, or modify, in whole or in part," the ERB's recommendations.

Rather than rendering its own finding regarding how the DOC determined the discipline for petitioner's work rule violation, the circuit court should have decided whether the CSC exceeded its own scope of review under its rules and regulations when approving and adopting the ERB's recommendation. Because it is clear from Civil Service Rule 1-15-5 that the CSC was permitted to approve and adopt the ERB's recommendations, the narrower focus of the circuit court's review should have been on how the ERB exercised its appellate review of the hearing officer's decision. If there was competent, material, and substantial evidence to support the ERB's recommendation to reverse the hearing officer's decision, and it was authorized by law, then the CSC's decision to approve and adopt the ERB's recommendation should have been upheld. Const 1963, art 6, § 28.

Because the circuit court essentially substituted its own view of the DOC's disciplinary decision for that of the CSC in determining that the hearing officer's decision should be reinstated, it exceeded its authority and grossly misapplied the substantial evidence test. A circuit court may not substitute its judgment for that of an agency if there is sufficient evidence

to support it. See generally *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 584; 701 NW2d 214 (2004).

Therefore, we agree with respondents that the circuit court's review did not comport with Const 1963, art 6, § 28. But we do not agree that the circuit court's findings violated MCR 7.105(M). Although the circuit court applied an incorrect standard, it adequately complied with the court rule by identifying "just cause" for the discipline as the finding affected by the lack of competent, material, and substantial evidence. Further, in light of our holding that the circuit court misapplied Const 1963, art 6, § 28, it is unnecessary to address respondents' claim that the separation of powers doctrine under Const 1963, art 3, § 2, was violated.

We do not find it necessary to remand this case to the circuit court for a proper review under Const 1963, art 6, § 28. A remand is unnecessary because it is clear from the record that there is no basis for vacating the CSC's decision to adopt and affirm the ERB's recommendation. There is no evidence that the ERB misapprehended its appellate standards in making its recommendation to the CSC. Further, there is no evidence that the ERB misapprehended the arbitrary and capricious standard applicable in the CSC to a disciplinary decision of the DOC, as set forth in the CSC decisions cited in the ERB's decision, or that those standards were unlawful. As set forth in *Dep't of Corrections v Clarke*, CSC 2001-007, the employee had the burden of proving that the particular discipline imposed was arbitrary and capricious. Further, as set forth in *Dep't of Corrections v Puls*, CSC 2001-005, there must be proportionality between the misconduct and the penalty for the misconduct, and the DOC, as the appointing authority, must use corrective measures and progressive discipline, when appropriate. Under the DOC's own 1998 Policy Directive No. 02.03.100, supervisory employees were to be held to a higher standard of conduct than other employees.

Factually, there is no evidence that the ERB substituted its judgment for that of the hearing officer with respect to any matter of witness credibility at the contested hearing. Rather, the ERB differed from the hearing officer with respect to inferences drawn from the evidence, the weight accorded by the hearing officer to the warden's original disciplinary recommendation, the seriousness of petitioner's conduct, and the comparability of other disciplinary decisions made by the DOC to petitioner's situation. The ERB gave adequate reasons grounded in the evidence to conclude that the hearing officer made a mistake in evaluating the evidence. In light of the evidence that the work rule violated by petitioner proscribes physical contact regardless of whether petitioner's intent was to engage in horseplay, as well as petitioner's numerous rule violations, and petitioner's high-ranking supervisory position, the ERB reasonably found that the DOC's discipline coordinator did not act arbitrarily and capriciously by imposing a 15-day suspension and reassignment as discipline.

Because it is clear from the record that the ERB's decision was supported by competent, material, and substantial evidence, there is no basis for disturbing the CSC's decision to adopt it. Accordingly, we vacate the circuit court's decision and reinstate the decision of the CSC. Cf. *VanZandt, supra* at 594-596; see also *Griffin v Civil Service Comm*, 134 Mich App 413, 421; 351 NW2d 310 (1984) (remand to a lower tribunal is unnecessary if the record is sufficiently developed for the reviewing court to resolve the issue).

Reversed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly